SUSSMAN & GOLDMAN

~Attorneys at Law~

1 Railroad Avenue, Suite 3, P.O. Box 1005, Goshen, New York 10924

Michael H. Sussman
Jonathan R. Goldman
Eli D. Siems

(845) 294-3991 [Tel]
(845) 294-1623 [Fax]
info@sussman.law

Christopher D. Watkins
Mary Jo Whateley
Of Counsel

Rasheed Hosein
Paralegal

Monica Ponce-Agredano
Legal Assistant

September 7, 2023

Honorable Vincent Briccetti
United states District Court – SDNY
300 Quarropas Street
White Plains, New York 10601

re: *Mora v. New York State Unified Court System, et al., 22 cv 10322 (VB)*

Dear Judge Briccetti,

I represent plaintiff in the within matter. I am enclosing a decision by the NY State Supreme Court, Eric County, in *Cooper v. Roswell Park Comprehensive Cancer Center, et al.*, Index No. 807274/2023 rendered on August 17, 2023 by Justice Emilio Colaiacovo which vacated an arbitral award upholding respondent's termination of a public health employee whose religious beliefs prevented her from receiving the COVID-19 vaccination.

The Court held the arbitral award violated public policy because the Department of Health Order which predicated petitioner's termination violated sections 206(1(l) and 613 of New York State's Public Health Law which forbid mandatory vaccinations of adults in New York. The Court further noted that the State Legislature had never repealed these laws or authorized the Commissioner of Public Health to promulgate mandatory vaccine regimes. I believe this reasoning is highly pertinent to the motions now pending before this Court as my client was like subjected to a mandatory vaccination regime which is as lacking in authority.

Finally, I would respectfully request that the court schedule oral argument on the pending motion to allow counsel to address this decision and other case law which has developed since our submissions.

Yours respectfully,

Michael H. Sussman

enc/

cc: All counsel of record via ECF

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

WENDY COOPER; and WAYNE SPENCE,
as the President of The New York
State Public Employees Federation, AFL-CIO,

Petitioners,

Memorandum Decision

for an Order Pursuant to CPLR Article 75,
Vacating an Arbitration Award,

Index No. 805274/2023

against

ROSWELL PARK COMPREHENSIVE CANCER CENTER
a/k/a (ROSWELL PARK CANCER INSTITUTE);
CANDACE JOHNSON, PH.D., as PRESIDENT AND CEO;
the BOARD OF TRUSTEES of ROSWELL PARK
COMPREHENSIVE CANCER CENTER;
MICHAEL L. JOSEPH, as Chairman of the BOARD
OF DIRECTORS of the ROSWELL PARK COMPREHENSIVE
CANCER CENTER; and
GREGORY F. DANIEL, MD, MMA as President of the
BOARD OF DIRECTORS of the ROSWELL PARK
COMPREHENSIVE CANCER CENTER,

Respondents.

NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION
Edward J. Greene, Jr., Esq.
Attorney for Petitioners

BOND, SCHOENECK, & KING, LLC.
Michael E. Hickey, Esq.
Attorney for Respondents

COLAIACOVO, J.

> *"[I]f emergency decrees promise to solve some problems, they threaten to generate others. And rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow."*
>
> Justice Neil Gorsuch, Arizona et al v. Mayorkas, et al., 598 U.S. ____ (2023).

In this context, trial courts are again tossed into the tempest of COVID-19 litigation and required to review cases challenging regulations implemented during the pandemic. However, the issue before this Court is rather narrow. Here, pursuant to Article 75 of the Civil Practice Law and Rules, Petitioners seek to vacate an Arbitrator's award which terminated Petitioner Wendy Cooper's employment at Roswell Park Cancer Institute, a New York State public benefit corporation formed pursuant to § 3553 of the New York Public Authority Law (hereinafter "Roswell Park").

Petitioner Wendy Cooper was a Registered Nurse at Roswell Park who was disciplined for her refusal to receive the COVID-19 vaccine pursuant to State Department of Health Regulation 10 NYCRR Section 2.61 (the "Regulation"). As a result of her refusal, she was terminated, and her termination was upheld by an Arbitrator. Petitioners contend, *inter alia*, that the Arbitrator ignored judicial precedent that declared the subject regulation unconstitutional, null and void. Respondents assert that Cooper's refusal to comply with the regulation constituted insubordination and they had just cause to terminate her.

Petitioners filed this action, pursuant to Article 75, seeking to vacate the Arbitrator's decision. Having heard argument, the matter was deemed submitted. The Court's decision is as follows.

FACTS AND PROCEDURAL HISTORY

By now, most are well-acquainted with the COVID-19 pandemic, its causes, steps taken by states and the federal government to combat it, and the many legal challenges made to some of the more burdensome restrictions imposed upon the public. Here, Wendy Cooper was a Registered Nurse who was employed by Roswell Park since 2016. Respondents concede that she was an excellent employee who, without blemish, complaint, grievance or discipline, performed her responsibilities and duties as a nurse, providing care to patients suffering from cancer.

In 2021, New York Governor Andrew Cuomo issued several executive orders allegedly enacted to combat the effects of the coronavirus. During this time, the Legislature ceded most of its constitutional duties to the executive branch in an attempt to rapidly address the fall-out from COVID-19. The Governor, acting pursuant to his unchecked powers, shuttered businesses, locked down schools, prohibited church services, prevented family gatherings, forbade funerals, encouraged citizens to surveil their neighbors, and restricted outdoor gatherings all in the name of "science" and "safety".[1]

In December 2020 and early January 2021, coronavirus vaccines were made widely available, and individuals were encouraged, in some instances, and others directed to be vaccinated. Citizens and residents were told that the vaccine would prevent contraction as well as transmission of the virus. With this representation, despite scant reliable testing to substantiate these guarantees, individuals *en masse* registered to receive the vaccine.

In June 2021, Governor Cuomo "rescinded his previous emergency orders related to the COVID-19 pandemic under certain Executive Orders [citation omitted]." Medical Professionals for Informed Consent v. Bassett, 78 Misc.3d 482 (Supreme Court, Onondaga County, 2023). The coronavirus state of emergency was effectively over. However, sometime thereafter, the Commissioner of Health for the State of New York, Mary T. Bassett, adopted 10 NYCRR §2.61(c) which effectively extended the emergency mandate and required "covered entities shall continuously require personnel to be fully vaccinated against COVID-19, absent receipt of an exemption as allowed below. Covered entities shall require all personnel to receive at least their first dose before engaging in activities covered under [citations omitted] of this section."

[1] Modified from Justice Gorsuch's statement on Arizona et al v. Mayorkas, et al., 598 U.S.____ (2023)

Id. at 484. Roswell Park later adopted its own in-house policy that mirrored the language of §2.61 and even referenced §2.61 in its policy.

Petitioner Cooper was originally granted a religious exemption to the administrative vaccine mandate. However, this was rescinded on December 6, 2021. See Verified Petition, ¶24; NYSCEF Doc. #1. On December 10, 2021, Roswell Park issued a Notice of Discipline (hereinafter "NOD"). Id. at ¶20. Five separate charges were levied against Cooper alleging that because she failed to get vaccinated, she violated §2.61, engaged in misconduct, was derelict in her duties, was incompetent, and insubordinate. Id. at ¶24, generally. Cooper was suspended without pay effective on December 7, 2021.

As an employee, she was represented by the Public Employees Federation of the AFL-CIO (hereinafter "PEF"). Further, she belonged to the Professional, Scientific and Technical Services (hereinafter "PS&T) bargaining unit of the union. Id. at ¶3,4. In response to her suspension, she filed a grievance and a demand for arbitration under Article 33 of the Collective Bargaining Agreement (hereinafter "CBA"). The American Arbitration Association appointed Thomas N. Rinaldo, a licensed attorney and certified Arbitrator, to hear the dispute. The questions presented to Mr. Rinaldo were:

(1) Did Roswell Park's suspension of Cooper comply with Article 33 of the CBA? If not, what would be the appropriate remedy?

(2) Did Roswell Park establish by a preponderance of the evidence that Ms. Cooper was guilty of the charges on December 10, 2021 NOD? If so, is the proposed penalty of termination appropriate, pursuant to the just cause principles referenced in Article 33 of the CBA? If not, and in consideration of the principles of just cause and progressive discipline as required by PEF/State CBA, what, if any, is appropriate?

Id. at ¶27. A hearing was held on November 22, 2022. Briefs were submitted on January 5, 2023. Id. at ¶28.

However, on January 13, 2023, Supreme Court Justice Gerard J. Neri issued his decision in Medical Professionals for Informed Consent v. Bassett. In Medical Professionals, Petitioners, a collection of doctors, nurses, and other health care employees, challenged §2.61 as *ultra vires*, preempted by state law, null and void, and/or unenforceable. See 78 Misc.3d at 483. Petitioners challenged the Commissioner's vaccine mandate, arguing that it was preempted by Public Health Law §§206, 613, 2164 and 2165. Public Health Law §206 provides:

> "[The Commissioner shall] establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health. Such programs may include the purchase and distribution of vaccines to providers and municipalities, the operation of public immunization programs, quality assurance for immunization related activities and other immunization related activities. The commissioner may promulgate such regulations as are necessary for the implementation of this paragraph. ***Nothing in this paragraph shall authorize mandatory***

> ***immunization of adults or children**, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter*" See Public Health Law § 206(1)(l). [emphasis added].

Justice Neri noted that Public Health Law §613 contained a similar prohibition on mandatory vaccinations. In §613, "[n]othing in this subdivision shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter." Id. at 484. Public Health Law §2164 covers only certain vaccines for children attending day care through high school, such as, *inter alia*, measles, mumps, rubella, tetanus, and hepatitis B. As noted by Justice Neri, "[t]he legislature intended to grant NYSDOH authority to oversee voluntary adult immunization programs, while ensuring that its grant of authority would not be construed as extending to the adoption of mandatory adult immunizations." citing Garcia v. NY City Dept. of Health & Mental Hygiene, 31 N.Y.3d 601 (2018).

In Medical Professionals, Justice Neri found that the COVID-19 vaccine mandate, as contained in §2.61, was unlawful in that it was beyond the scope of the Respondents' authority. Id. at 491. He noted that the Commissioner was specifically prohibited from implementing a mandatory immunization program except as provided for in Public Health Law §206.1. The Commissioner could not promulgate any new restrictions outside those that were specifically authorized by the legislature. No such grant was authorized by the legislature during the entire pandemic. The Public Health Laws cited "created a ceiling, limiting what Respondents may do, not a floor demarking the base from which to start." Id. at 490. Citing Garcia, Justice Neri reminded Respondents that the Court of Appeals already chastened health agencies that stepped outside their legislatively created boundaries. "The legislature intended to grant NYSDOH authority to oversee adult immunization programs, while ensuring that its grant of authority would not be construed as extending to the adoption of mandatory adult immunizations." Garcia, 31 N.Y.3d at 620. In finding that §2.61 was beyond the scope of Respondents' purview or authority, Justice Neri found it null, void, of no effect, and that Respondents, and their agents or officers, and employees were prohibited from implementing or enforcing the mandate. Id. generally at 491.

Lawyers for Cooper notified Arbitrator Rinaldo and the Respondents that the State Supreme Court had struck down the very mandate at the heart of Wendy Cooper's NOD. They also requested a stay. However, Arbitrator Rinaldo found Cooper guilty of all charges and found termination the appropriate remedy in his decision dated January 27, 2023. He noted, "the wisdom or lack thereof of the State Policy embodied in the Regulation and the directives to Grievant to receive a COVID-19 vaccination, as with the accommodation issue, are beyond the jurisdiction of the Arbitrator." See Verified Petition, §42, "Exhibit A"; NYSCEF Doc. #1. Arbitrator Rinaldo acknowledged the Medical Professionals decision *in a footnote* [emphasis added] of his decision and explained why he did not rely on it. In his footnote, Rinaldo noted,

> The Arbitrator is aware of the recent Decision and Order issued by State Supreme Court, Onondaga County, (Medical Professional[s] for Informed Consent et al. v. Bassett et al, January 13, 2023). Given the Arbitrator's ruling that his jurisdiction is limited to interpreting and applying the provisions of the Parties' Agreement, the Arbitrator finds that the import of this Decision, significant as it might be, is beyond the Arbitrator's jurisdiction to consider, or, for that matter, to apply to the analysis set forth [in] this Award.

Ignoring this precedent, Arbitrator Rinaldo found that Cooper was indeed derelict in her duties, incompetent, insubordinate, and that Respondents had just cause to terminate her, notwithstanding decisional law striking down the very vaccine mandate that was the basis for her termination.

After Rinaldo's decision to confirm Cooper's termination, the Fourth Department issued a stay of Medical Professionals. At oral argument of the appeal, Respondents "announced that 'they intend to repeal the regulation being challenged'." See Verified Reply, ¶11; NYSCEF Doc. #22. Further, the Department of Health submitted a letter to the Fourth Department that "[e]ffective immediately, the Department will cease citing providers for failing to comply with the requirements of 10 NYCRR Section 2.61 while the repeal is under consideration by the Public Health and Healthy Planning Council." Id. at ¶12, see Exhibit D. On June 8, 2023, Respondents in Medical Professionals filed a motion to vacate the stay. As of August 8, 2023, Appellants had not submitted a response to the motion. As it appears that the motion is unopposed, if granted, the stay would be vacated and Justice Neri's decision would stand.

During oral argument on the present petition, Respondents conceded that, other than refusing the vaccine, Cooper was a stellar employee without blemish. Further, Respondents conceded that they have begun to reach out to health care employees who are members of PEF and currently suspended for their failure to be vaccinated, to invite them back as employees for Roswell Park without condition. When confronted with a hypothetical, though acknowledging he was not the one charged with the responsibility of hiring individuals at the hospital, counsel for the Respondent acknowledged that if Cooper applied for a nursing position at Roswell Park, considering her past employment record and level of performance, she would be hired back.

LEGAL STANDARD

This proceeding was brought pursuant to CPLR 7511 and 7514. "Under CPLR 7511 an arbitration award must be vacated if a party's rights were impaired by an Arbitrator who 'exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made'." Matter of Kowaleski (New York State Dept. of Correctional Servs.), 16 N.Y.3d 85 (2010). "It is well settled that a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the Arbitrator's power." Matter of

Falzone (New York Cent. Mut. Fire Ins. Co.), 15 N.Y.3d 530 (2010); Matter of O'Flynn (Monroe County Deputy Sheriffs' Assn., Inc.), 141 A.D.3d 1097 (4th Dept. 2016).

ARGUMENTS

Petitioners argue that the Arbitrator's decision violates public policy. More specifically, Petitioners contend that the vaccine mandate was held beyond the scope of the State Health Commissioner's authority and thus was null, void, and unenforceable. They submit that to enact such a mandate is the province of the legislature and not the Health Commissioner. Further, they submit, the mandate at issue contradicts a legislatively enacted law, namely Public Health Law §206, which specifically limits the scope of vaccination requirements for children and adults and generally prohibits mandatory vaccination programs for children and adults. Absent legislation providing otherwise, Plaintiffs maintain the Respondents had no authority to enact such a rule. As this was found otherwise unenforceable *ab initio*, the Arbitrator's decision to nonetheless enforce it violates public policy. Further, in doing so, the Arbitrator's decision was irrational. Refusing to apply an intervening decision from a court of competent jurisdiction, according to Petitioners, meets the definition of irrationality. Consequently, the Arbitrator's decision must be vacated.

Respondents insist that the Arbitrator's decision was not contrary to public policy. Instead, Respondents insist that public policy is constantly changing and evolving and thus, the Arbitrator was correct in focusing his decision on the collective bargaining agreement as opposed to the decision in Medical Professionals. Similarly, the Arbitrator's decision should be upheld because Roswell Park had just cause to terminate Cooper. At the time Cooper was terminated, the mandate had not been set aside and the employer's decision was based on the employee's conduct at the time discipline was imposed. Respondents maintain that the Arbitrator's decision finding Roswell Park had just cause to terminate Cooper was rational and thus immune from judicial review. At the time Roswell Park terminated Cooper, they were legally required to enforce the mandate, regardless of whether it was subsequently set aside. As such, the Arbitrator's award to confirm the employer's decision was rational.

DECISION

To review a decision upholding the termination of an otherwise stellar employee who would now be welcomed back as a Registered Nurse by the same employer, whose only transgression was refusing a vaccine whose efficacy has been scientifically disputed, thus violating a policy that has since been held to be null, void, invalid and is now not enforced by the State or her current employer, would appear to be a waste of judicial resources. However, given Respondent's disregard of the practical considerations of the dispute, the Court will address the merits of the matter.

I.

The Arbitrator's Decision Violates Public Policy

As Justice Neil Gorsuch noted in Arizona et al v. Mayorkas, et al., "while executive officials issued new emergency decrees at a furious pace, state legislatures and Congress—the bodies normally responsible for adopting our laws—too often fell silent." Arizona et al v. Mayorkas, et al., 598 U.S. ____ (2023). In New York, it is the legislature, not the executive and certainly not the Commissioner of Health, that advances public policy. While Respondents suggest that "public policy" is ever changing and constantly evolving, that alone does not justify ceding authority to change policy to unelected bureaucrats and appointees who, in some instances, criminalize behavior or, in this case, deprive individuals of their rights. While Respondents cite to Matter of Spritzen to support their argument that "public policy" evolves, a portion of that decision it is rather illuminating. See Matter of Sprintzen, 46 N.Y.2d 623 (1979). In Matter of Spritzen, Judge Matthew Jasen wrote, "an Arbitrator is free to apply his own sense of law and equity to the facts as he has found them to be in resolving a controversy." Id. at 631. This rationale endows Arbitrators with unlimited powers that are not properly delegated to them. This decision suggests that an Arbitrator can, at their own discretion, apply their "own sense of law" to cases such as these. This only further surrenders peoples' protected liberties to Arbitrators, who are unelected and otherwise unaccountable, to pursue "their sense of the law." While the application of this precedent is not at issue, if the Arbitrator is empowered to apply his own sense of equity to the facts, it is troubling to find that this Arbitrator found it fair and just to confirm Cooper's termination despite there being scant evidence of Ms. Cooper being derelict in her duties, incompetent or insubordinate, other than refusing to take a vaccine pursuant to a mandate which was found to be found null and void, that the person issuing the mandate lacked the authority to do so, and that the rule was unenforceable.

This Court finds that the Arbitrator's decision should be vacated because it is irrational and against public policy. See supra Matter of Falzone (New York Cent. Mut. Fire Ins. Co.), 15 N.Y.3d 530 (2010); Matter of O'Flynn (Monroe County Deputy Sheriffs' Assn., Inc.), 141 A.D.3d 1097 (4th Dept. 2016). Justice Neri correctly noted that the vaccine mandate clearly violated the separation of powers. This concept, which is elementarily understood to be a bedrock principle in our system of governance, "requires the Legislature to make the critical policy decisions, while the executive branch's responsibility is to implement those decisions." Medical Professionals for Informed Consent v. Bassett, 78 Misc.3d at 485; citing Garcia v. NY City Dept. of Health and Mental Hygiene, 31 N.Y.3d 601 (2018). While the legislature ceded much of its authority to the executive, which often went unchecked by the third branch, the legislature still enacted legislation during the pandemic. It passed several laws ranging from women's reproductive rights to criminal justice reform during the pandemic. However, what it did not enact was a state-wide vaccine mandate. Without legislative support, the codification of a vaccine mandate in §2.61 contravened the only applicable laws the legislature actually did pass, namely Public Health Law §206, which expressly forbade vaccine mandates in adults and children. This had to be understood by the Commissioner, as her Department was abundantly aware of its limitations when the Court of Appeals reminded it in Garcia that there was no authority for the adoption of a sweeping adult immunization mandate. See Garcia, 31 N.Y.3d at 620. The fact that the Commissioner did so, despite the Court of Appeals' decision in 2018, is a clear example of a violation of public policy. Absent an act of the legislature that specifically authorized a universal vaccine mandate, the Commissioner's mandate was null and void, and could not be relied on. The fact that the Arbitrator confirmed Ms. Cooper's termination in the face of Garcia and Medical Professionals further convinces this Court of the arbitrariness and irrationality of the decision to terminate.

It naturally follows that to follow and apply a flawed public policy, especially one that was declared, *ab initio*, null and void, requires vacating decision and award of the Arbitrator.

II.

The Arbitrator's Decision is Irrational

As previously noted, while Ms. Cooper's matter was submitted and before the Arbitrator issued his decision, Justice Neri issued his decision in Medical Professionals. Nevertheless, though acknowledging the decision in a footnote, the Arbitrator ignored it and found for the employer. Ignoring precedent alone is a basis to vacate the award. This Court is not alone in vacating suspect arbitration awards. While the Court recognizes the wide-birth afforded to Arbitrators, it is not unlimited.

In Trifaro v. Town of Colonie, a police offer applied for benefits and was denied. However, between the date of the application filing and the date of the hearing officers' decision, the Court of Appeals issued its decision in Matter of Theroux v. Reilly. See 1 N.Y.3d 232 (2003). Like here, the hearing officer was advised of the development in case law and ignored it. In Trifaro, the Third Department held that "the hearing officer's failure to apply the intervening Court of Appeals decision was an error of law." 31 A.D.3d 821 (3rd Dept. 2006). The Court explained that a hearing officer, or an Arbitrator as the case may be, must apply the law as it exists at the time, even if the law has been altered since the commencement of the action or proceeding." Id. Respondents suggest that because the mandate was enforceable at the time of discipline it naturally follows that Roswell Park had just cause to fire her. However, applying Trifaro, it naturally follows that if there is a change of law while litigation is ongoing, a hearing officer or Arbitrator cannot simply elect to ignore it. Since the mandate which formed the basis for Ms. Cooper's termination was found to be invalid while the matter was being litigated, the Arbitrator's decision upholding the termination must be vacated.

Petitioners cite to Beard v. Town of Newburgh, which this Court finds persuasive. 259 A.D.2d 613 (2nd Dept. 1999). In Beard, a petitioner commenced an Article 75 action to vacate an arbitration award. The sole issue for denying the petitioner relief was his criminal conviction. However, the criminal judgment was subsequently reversed and the Second Department vacated the arbitration award. Though the reversal occurred after the Arbitrator's decision, the Second Department did not hesitate to vacate. As the issue at the heart of the arbitration was moot, the Second Department did not hesitate to reverse it even after the decision had been reached. The same analysis applies here. Regardless of when the misconduct occurred, if the Arbitrator became aware of something that would have otherwise altered the outcome, he is bound to follow it. But for the invalid mandate, Wendy Cooper would still be working at Roswell Park. Thus, if the mandate is found to be invalid, which it was by virtue of Medical Professionals, the Arbitrator should have taken notice of it and restored her to the *status quo ante*. His failure to do so was irrational. See generally Schiferle v. Capital Fence Co., Inc., 155 A.D.3d 122 (4th Dept. 2017); Matter of

Syracuse Firefighters Assn., Local 280, IAFF, AFL-CIO, CLC (City of Syracuse), 213 A.D.3d 1249 (4th Dept. 2023).

Respondents assert that the Arbitrator's decision should be left undisturbed because Roswell Park had just cause to terminate Ms. Cooper for her refusal to take the COVID-19 vaccine. Black's Law Dictionary defines "just cause" as "a legally sufficient reason." Black's Law Dictionary (Pocket Edition, 1996), p. 87. However, given Justice Neri's decision in Medical Professionals, Respondent's reliance on a theory of termination for cause is misplaced. After all, if the mandate Roswell Park was enforcing when they suspended her and eventually terminated Ms. Cooper has been deemed null, void and unenforceable, it is unreasonable for them to continue to argue that their action should be upheld as legally sufficient.

The entire termination was based on Cooper's decision to refuse the vaccine. The decision was never based on other additional factors. Thus, if the basis for her termination legally collapsed, which it did by Justice Neri's decision, any action taken in contravention of that precedent is irrational and invalid.

As such, the Arbitrator's decision should be vacated.

III.

Interests of Justice

While it is quite clear that the Arbitrator acted irrationally and in violation of public policy, it is this Court's judgment that the Arbitrator's decision to enforce a mandate, which clearly violated public policy, that had been declared null, void and unenforceable *ab initio,* and was the product of administrative overreach by the State and Roswell Park, was not in the interests of justice. To confirm such an award would do great harm to the principles of justice, fairness and equity.

To fire an exemplary employee, who did nothing but refuse the vaccine, whose mandate was declared null and void, would offend the very nature of justice. To confirm findings that she was incompetent, derelict, or even bestow a judicial imprimatur, based on this record, that somehow, she engaged in misconduct, would do tremendous harm to her professional career. To permit such a stain on her character seems incongruent given the undisputed facts. To further penalize her, given that the State is now abandoning its appeal of Medical Professionals, has rescinded the mandate, is no longer enforcing a vaccine requirement, and would welcome her back as a Registered Nurse, is contrary to the very pursuit of justice.

Appellate and trial courts have often granted equitable relief all in the name of the interest of justice. See generally In Allstate Ins. Co. v. Levy, 206 A.D.2d 527 (2nd Dept. 1994). Further, courts have vacated arbitration awards that manifestly disregard the law. See generally, Matter of Spear, Leeds, & Kellog v. Bullseye Secs., 291 A.D.2d 255 (1st Dept. 2002). It would be inconsistent with the standards of justice to further penalize Ms. Cooper.

Ms. Cooper is an unfortunate victim in the wake of excesses exhibited by governors, administrators, legislatures, and yes, even the judiciary. All too frequently did critical thinking, and the exercise of personal liberties expire at the altar of false righteousness, fear, and authority. As Justice Gorsuch observed,

> Courts bound to protect our liberties addressed a few—but hardly all—of the intrusions upon them. In some cases ... courts even allowed themselves to be used to perpetuate emergency public-health decrees for collateral purposes, itself a form of emergency-lawmaking by-litigation .... One lesson might be this: Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat....We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties—the right to worship freely, to debate public policy without censorship, to gather with friends and family, or simply to leave our homes. We may even cheer on those who ask us to disregard our normal lawmaking processes and forfeit our personal freedoms .... But maybe we have learned another lesson too. The concentration of power in the hands of so few may be efficient and sometimes popular. But it does not tend toward sound

> government. However wise one person or his advisors may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process.... Make no mistake—decisive executive action is sometimes necessary and appropriate. But if emergency decrees promise to solve some problems, they threaten to generate others. And rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow. [citations omitted]
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> Arizona et al v. Mayorkas, et al., 598 U.S. ____ (2023).

While appellate courts are charged with finding error, a trial court aims at doing justice. This Court fails to see the justice in the vain attempt to uphold the inviolability of an Arbitrator's decision, relying on all of the precedent that creates an impenetrable shell, at the expense of Ms. Cooper's livelihood, especially considering the absence of hearty-opposition from the Respondents, their willingness to acknowledge her impeccable credentials, the abandonment of their appeal in Medical Professionals, the obvious overstep of the executive branch at the expense of the legislature, the recission of the mandate, and the lack of any vaccine requirement to be employed at any public hospital. Further, there is no justice when an individual is branded as a derelict or an incompetent for merely exercising her individual rights.

It is in the interest of justice to vacate the Arbitrator's decision.

IV.

Having concluded that the Arbitrator's decision is irrational, violative of public policy, and contrary to the interests of justice, the Court hereby VACATES the decision of the Arbitrator and ORDERS the Petitioner Wendy Cooper REINSTATED and her employment record AMENDED.

As this Court is without jurisdiction or a proper record to address the issue, the Court directs the parties to negotiate, pursuant to the CBA, any questions of retroactive pay and benefits.

The Court DENIES Petitioners' request for costs, fees, or disbursements.

This shall constitute the Decision of the Court. Petitioners shall submit an Order consistent with this Decision on notice to Respondents.

Hon. Emilio Colaiacovo, J.S.C.

Dated: August 17, 2023
Buffalo, New York